Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES DESMOND TUCKER,

Petitioner,

v.

FRANK EDWARD FEARN and
JUDY FEARN

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether parents can recover loss of society damages for the death of their minor child in a wrongful death action brought under the general maritime law where the parents were not financially dependent on their minor child.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Charles Desmond Tucker, respectfully prays that a writ of certiorari issue to review the June 10, 2003, judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in the above-captioned proceeding.

OPINIONS BELOW

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit of June 10, 2003, styled *Charles Desmond Tucker v. Frank Edward Fearn and Judy Fearn*, and reported at 333 F.3d 1216 and reprinted at App. 1a. The July 16, 2002 decision of the district court, granting defendants' motion to strike plaintiff's claim for nonpecuniary damages, is unreported but is reprinted at App. 17a.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit of June 10, 2003. The United States Supreme Court has jurisdiction to review decisions from the United States courts of appeals by virtue of 28 U.S.C. § 1254(1).

STATEMENT

This is an admiralty case in which Charles Desmond Tucker, the father of Charles Justin Tucker and the duly qualified Personal Representative of the Estate of Charles Justin Tucker, seeks both pecuniary and non-pecuniary damages for the wrongful death of his son due to the negligence of the defendants, Frank Edward Fearn and Judy Fearn. Charles Justin Tucker died as a result of injuries

received in a recreational boating collision which occurred in Alabama territorial waters on October 23, 1998.

On July 22, 2002 the District Court denied the Defendants' Motion for Summary Judgment and found triable issues of fact as to whether the Defendants violated their statutory duty under Rule 5 of the Inland Navigational Rules, 33 U.S.C. § 2005, to maintain a proper lookout and whether that failure was a contributory cause of the collision. On July 29, 2002 the District Court denied the Defendants' Motion to Reconsider the Denial of the Motion for Summary Judgment. However, the District Court struck from the pleadings the Petitioner's claim for non-pecuniary damages. The effect of the granting of this motion is that the only damages that the Petitioner can possibly recover for the wrongful death of his teenage son is $7,500.00 in funeral expenses.

Mr. Tucker thereafter perfected an interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit. On June 10, 2003, the Court of Appeals affirmed. On August 15, 2003, the Court of Appeals denied the Petitioner's Petition for Rehearing and Petition for Rehearing En Banc.

REASONS FOR GRANTING THE PETITION

While the issue presented to this Court is a narrow one, it calls upon the Court to once again exercise its authority as the ultimate guardian of the integrity and coherence of the nation's admiralty law. See *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959) ("The issue is one of importance in the development of the law maritime, as to which we have large responsibilities, constitutionally conferred ...."). Whether loss of society damages for the death of a minor child are

recoverable by non-dependent parents is a question that has bedeviled the admiralty jurisprudence of the courts of appeals, as they have sought (as in the decision below) to reconcile the sometimes discordant authority of this Court in fashioning adequate remedies for wrongful deaths occurring within state territorial waters under the general maritime law.

THE AVAILABILITY OF AN ADEQUATE REMEDY IN THIS CASE IS COMPELLED BY THE PRECEDENTS OF THIS COURT

The Petitioner, Charles Desmond Tucker, respectfully submits that the availability of an adequate remedy in this case is compelled by a synthesis of precedents of this Court.

In *Moragne v. States Marine Lines*, 398 U.S. 375, (1970), the United States Supreme Court recognized a federal common law right of action for the wrongful death of non-seamen in state territorial waters.[1] In so holding, the United States Supreme Court overruled *The Harrisburg*, 119 U.S. 199 (1886), which had held that wrongful death causes of action are merely statutory and may not be created by judicial decree. In *Moragne*, this Court, at 398 U.S. 381, held that *The Harrisburg* amounted to "a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious

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[1] In *In Re Amtrak "Sunset Limited" Train Crash*, 121 F.3d. 1421 (11th Cir. 1997), the Eleventh Circuit held that the Alabama wrongful death statute, as interpreted by the Alabama Supreme Court, conflicts with fundamental principles of federal admiralty law insofar as it permits an award of punitive damages based on simple negligence and does not provide for the apportionment of fault.

enough to cause death."[2] In *Moragne,* this Court added, citing the *Sea Gull*, 21 Fed. Cas. 909 (No. 12, 578) (C.C. Md. 1865), "Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." 398 U.S. at 387

In the words of this Court in *Moragne*, the result of the lower courts' decisions in this case represents a striking departure from the result dictated by elementary principles in the law of remedies. If Justin Tucker had been injured by the Defendants' negligence, he could have recovered his full measure of damages. However, because he was killed by the Defendants' negligence, his parents are denied an adequate remedy and may only recover for his funeral expenses. Moreover, as will hereinafter be demonstrated, there are no established and inflexible rules which require the courts to withhold an adequate remedy where a child is killed through the negligence of the Defendants in state territorial waters.

In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), the United States Supreme Court set forth the parameters of the federal common law action established in *Moragne*. The Court began its analysis by noting that before the *Moragne* decision, wrongful death actions for deaths occurring on navigable waters within the three-mile territorial waters of a state depended on whether the state had enacted a wrongful death statute and, if so, whether the statute permitted recovery.[3] 414 U.S. at 576. The Court also noted that the *Moragne* decision reflected the Court's

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[2] However, *Moragne* did not address the specific remedies which are available under the federal common law right of action for wrongful death.

[3] This is the functional equivalent of what the lower courts have held in the case *sub judice*.

dissatisfaction with this state of the law that illogically and unjustifiably deprived the dependents of many maritime death victims of an "adequate" remedy for their losses. The Court went on to note that the *Moragne* decision ended this anomaly by creating a "*uniform*" federal cause of action for maritime wrongful-death designed to extend to the dependents of maritime wrongful-death victim's admiralty's special solicitude for welfare of those men who undertake to venture upon hazardous and unpredictable sea voyages, 414 U.S. at 577. The Supreme Court added that under *Moragne*, the maritime wrongful-death remedy is "not a statutory creation but judge-made." 414 U.S. at 583. The Court completed its contextual analysis at 414 U.S. at 583 by observing that the "shape of the new maritime wrongful-death remedy..." should "...be guided by the principle of maritime law that certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."

This Court went on to identify the particular harms for which the maritime wrongful-death remedy permits recovery of damages. 414 U.S. at 583 et seq. Reviewing the *Death on the High Seas Act*, 46 U.S.C. 761 et seq, numerous state wrongful-death acts and the policies of maritime law, the Supreme Court concluded that under the maritime wrongful-death remedy, the decedent's dependents may recover damages for their loss of support, services, and society as well as funeral expenses. 414 U.S. at 584. The Court held that "the term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship and protection. Unquestionably, the deprivation of these benefits by wrongful death is a grave loss to decedent's dependents."

In a crucial passage in *Gaudet*, 414 U.S. at 585, n. 17, this Court went on to distinguish loss of society from mental anguish or grief, which is not recoverable. In this discussion, the Court noted that the loss of society, which is recoverable, focuses "...on more positive aspects of the injury, such as what would the decedent, had he lived, have contributed in terms of support, assistance, training, comfort, consortium, etc."[4] The Supreme Court went on to observe that its decision to permit recovery for loss of society aligned the maritime wrongful-death remedy with a majority of state wrongful-death statutes permit recovery for loss of society. 414 U.S. at 588. The Supreme Court concluded that "... in any event, our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction."

LOWER COURT DECISIONS HAVE MISAPPLIED THIS COURT'S PRECEDENTS IN REJECTING LOSS OF SOCIETY DAMAGES FOR NONDEPENDENT PARENTS

As occurred in the decision below, see App. 7a-9a, lower courts relied heavily on the decisions of this Court in *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978) (hereinafter referred to as "*Higginbotham*") and *Miles v. Apex*

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[4] In *THE LAW OF ADMIRALTY*, SECOND EDITION (Foundation Press 1975) at p. 372, Grant Gilmore and Charles L. Black Jr. state that this footnote (No. 17) "may well be the least convincing footnote in the history of our jurisprudence". The Petitioner respectfully submits that this Petition for Certiorari presents the opportunity for this Court to reconsider the distinction which it drew in this footnote and allow damages for grief and loss of affection as well as loss of society in wrongful death cases under the general maritime law. However, it is not necessary for this Court to reconsider this distinction in order for Petitioner to prevail in his claim for loss of society damages.

Marine Corporation, 498 U.S. 19 (1990) (hereinafter referred to as "*Miles*"). The Petitioner respectfully submits that the lower courts have read *Higginbotham* and *Miles* too broadly and that their reliance thereon to deny plaintiffs such as Mr. Tucker an adequate remedy for the death of their son is misplaced.

The Eleventh Circuit Court of Appeals quoted from *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990), as follows "*Gaudet* only applies in territorial waters, and it only applies to longshoremen." App. 9a (quoting 498 U.S. at 31). While it is certainly true that in *Miles v. Apex Corporation*, this Court made this statement, the Petitioner respectfully submits that the quoted sentence does not negate the precedential force of the decision of this Court in *Gaudet*. Mr. Gaudet was a longshoremen and the ruling in that case technically only applied to him.[5] However, this does not mean that *Gaudet* is not a persuasive precedent that cannot and should not be applied to those Plaintiffs who are not longshoremen.

Likewise, the results in *Higginbotham* were dictated by statute because the Death on the High Seas Act, 46 U.S.C. 761 et seq, at the time of the decision of this Court, expressly limited a decedent's survivors' recovery to "pecuniary loss".[6] However, since the *Higginbotham* decision, Congress has

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[5] In *Miles*, this Court stated at 498 U.S. 30: "There is also little question that *Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen."

[6] In *Miles*, this Court stated at 498 U.S. 31 regarding the *Higginbotham* decision: "Congress made the decision for us. DOSHA, by its terms, limits recoverable damages in wrongful death suits to "*pecuniary* loss sustained by the persons for whose benefit the suit is brought." 46 U.S.C.App. § 762 (emphasis added). This explicit limitation forecloses recovery for non-pecuniary loss, such as loss of society, in a general maritime action."

added subsection (b) to § 762. Section 2 of DOSHA, 46 U.S.C. § 762, now provides:

> "(b)(1) If the death resulted from a commercial aviation accident occurring on high seas beyond 12 nautical miles from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, additional compensation for nonpecuniary damages for wrongful death of decedent is recoverable. Punitive damages are not recoverable.
>
> (2) In this subsection, the term 'nonpecuniary damages' means damages for loss of care, comfort, and companionship."

In any event, this Court in *Higginbotham*, stated at 436 U.S. 622:

> In *Moragne* the Court left various subsidiary questions concerning the nonstatutory death remedy—such as the schedule of beneficiaries and the limitations period--for "further sifting through the lower courts in future litigation." *Id.*, at 408, 90 S.Ct., at 1972. A few years later, in *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, the Court confronted some of these questions. Among the issues addressed in *Gaudet* was the measure of survivors' damages. The Court held that awards could include compensation for loss of support and services, for funeral expenses, and for loss of society, but not for mental anguish or grief. *Id.*, at 583-591, 94 S.Ct., at 814-818. The Court recognized that

> DOSHA, which compensates only for pecuniary losses, did not allow awards for loss of society. But the accident in *Gaudet*, like that in *Moragne*, took place in territorial waters, where DOSHA does not apply. The Court chose not to adopt DOSHA's pecuniary-loss standard; instead it followed the "clear majority of States" and "the humanitarian policy of the maritime law," both of which favored recovery for loss of society. 414_U.S., at 587-588, 94 S.Ct., at 816. In sum, the Court made a policy determination in *Gaudet* which differed from the choice made by Congress when it enacted the Death on the High Seas Act.

In *Miles* this Court held that the parent of a seaman who died from injuries incurred aboard the respondents' vessel could not recover loss of society damages under the Jones Act, 46 U.S.C. § 688, or the general maritime law. The Petitioner respectfully submits that this Court's holding in *Miles* was also driven by statute. This Court noted that the Jones Act makes applicable to seamen the substantive recovery provisions the Federal Employers' Liability Act of the (FELA).[7] 45 U.S.C. § § 51-59. This Court also noted that the FELA had been consistently interpreted as providing recovery for only pecuniary losses. 498 U.S. at 32. This Court reasoned that since Congress incorporated the FELA

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[7] This Court noted at 498 U.S. at 29 that: "... The Jones Act establishes a uniform system of seamen's tort law parallel to that available to employees of interstate railway carriers under the FELA." The Petitioner respectfully submits that like workers compensation schemes generally, the special protections afforded seaman have brought about trade-offs which balance the certainty of recovery with limitations upon the employer's ultimate exposure.

unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well because it is presumed that Congress is aware of existing law when it passes legislation.

Therefore, the Court held that the Jones Act precludes recovery for loss of society damages. This Court went on to note at 498 U.S. 32-33 that the seamen's parent could not recover loss of society damages on her unseaworthiness claim because it would be inconsistent with the Supreme Court's place in the constitutional scheme were the Court to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting in negligence. However, in *Miles* this Court previously noted at 498 U.S. 27 that:

> "In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions."

This Court in *Miles* also referred at 498 U.S. 27 to "the constitutionally based principle that federal admiralty law should be a system of laws coextensive with, and operating uniformly in, the whole country'", citing *Moragne*.

In *Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199, 116 S.Ct.619, 133 L.Ed. 2d 578 (1996), this Court affirmed a ruling of the lower courts that allowed the parents of a twelve-year-old child who was killed in a jet ski accident to seek to recover damages for the loss of society under *Moragne*. In *Yamaha Motor Corporation*, this Court borrowed the applicable state wrongful death statute which was not in conflict with fundamental principles of federal admiralty law. This Court held at 516 U.S. 213-214:

> *Moragne*, in sum, centered on the extension of relief, not on the contraction of remedies. The decision recalled that " 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'"... Our understanding of *Moragne* accords with that of the Third Circuit, which Judge Becker set out as follows: "*Moragne* ... showed no hostility to concurrent application of state wrongful death statutes. Indeed, to read into *Moragne* the idea that it was placing a ceiling on recovery for wrongful death, rather than a floor, is somewhat ahistorical. The *Moragne* cause of action was in many respects a gap-filling measure to ensure that seamen (and their survivors) would all be treated alike. The 'humane and liberal' purpose underlying the general maritime remedy of *Moragne* was driven by the idea that survivors of seamen killed in state territorial waters should not have been barred from recovery simply because the tort system of the particular state in which a seaman died did not incorporate special maritime doctrines. It is difficult to see how

> this purpose can be taken as an intent to preclude the operation of state laws that do supply a remedy.

This Court added at 516 U.S. 215:

> When Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause for enlargement of the damages statutorily provided. See *Miles,* 498 U.S., at 30-36, 111 S.Ct. at 324-328 (Jones Act, rather than general maritime law, determines damages recoverable in action for wrongful death of seamen); *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 232, 106 S.Ct. 2485, 2499, 91 L.Ed.2d 174 (1986) (DOSHA, which limits damages to pecuniary losses, may not be supplemented by nonpecuniary damages under a state wrongful-death statute); *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 624-625, 98 S.Ct. 2010, 2014-2015, 56 L.Ed.2d 581 (1978) (DOSHA precludes damages for loss of society under general maritime law.) But Congress has not prescribed remedies for the wrongful death of nonseafarers in territorial water.

The last decision of this Court in the line of cases that bear on the legal issue raised by this writ application is *Norfolk Shipbuilding and Drydock Corporation v. Garris*, 532 U.S. 811 (2001). In *Norfolk*, this Court held that the negligent breach of a maritime duty of care is actionable

when it causes death, as it is when it causes injury.[8] In reaching this conclusion, this Court reviewed three statutes – the Jones Act, DOSHA, and the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. 901 et seq. – to determine whether they precluded the Respondent's negligence action. This Court held that they did not. As to the Jones Act, this Court held at 532 U.S. 817-818: "Respondent's son, who was not a seaman, was not covered by the Jones Act, and we have held that the Jones Act bears *no implication* for actions brought by nonseamen." (emphasis supplied) As to DOSHA, this Court held at 532 U.S. 818: "...No intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be appropriate to effectuate the policies of general maritime law." This Court added at 532 U.S. 820:

> Even beyond the express pre-emptive reach of federal maritime statutes, however, we have acknowledged that they contain a further prudential effect. "While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field... Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to

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[8] This Court noted that since *Moragne's* facts were limited to the duty of seaworthiness the issue of whether there is a wrongful death action for negligence has remained technically open. However, this Court found no rational basis for distinguishing between negligence and seaworthiness.

> Congress. The cause of action we recognize today, however, is new only in the most technical sense. The general maritime law has recognized the tort of negligence for more than a century, and it has been clear since *Moragne* that breaches of a maritime duty are actionable when they cause death, as when they cause injury. Congress's occupation of this field is not yet so extensive as to preclude us from recognizing what is already logically compelled by our precedents.

Petitioner respectfully submits that the general maritime law has recognized the availability of an adequate remedy for wrongful death since *Moragne* was decided in 1970 and has recognized that loss of society damages are an integral part of this adequate remedy since *Gaudet* was decided in 1974. As in *Norfolk*, Congress's occupation of this field is not so extensive as to preclude this Court from recognizing what is logically compelled by this Court's precedents – that parents of minor children who are killed because of negligence that occurs in territorial waters have an adequate remedy for their losses.

THERE IS A SPLIT IN THE DECISIONS OF THE CIRCUIT COURTS ON THE LEGAL ISSUE PRESENTED BY THISPETITION

As noted in the decision of the Eleventh Circuit in the case s*ub judice*, App. 12a, there is a split in the decisions of the circuit courts on the legal issue presented by this petition. In *Wahlstrom v. Kawasaki Heavy Industry*, 4 F. 3d. 1084 (2nd Cir. 1993), *Anderson vs. Whittaker Corporation*, 894 F. 2d. 804 (6th Cir. 1990) and *Miles vs. Melrose*, 882 F.2d 976 (5th Cir. 1989), aff'd sub nom on other grounds, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed. 2d 275,

the courts held that nondependent survivors may not recover loss of society damages in wrongful death actions for a nonseaman's death in territorial waters. However, in the subsequent decision of *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994) the Fifth Circuit observed at 903 that the jurisprudence on this point was a "tangled skein of case law" and held that children of a deceased parent who were not financially dependant on the parent might be able to recover loss of society damages in the Fifth Circuit. See also the Fifth Circuit's affirmance without opinion at 114 F.3d 1184 (5th Cir. 1997) of the District Court's decision in *Blome v. Aerospatiale Helicopter Corporation*, 924 F. Supp. 805 (S.D. Tex. 1996).

Moreover, in *Sutton v. Earles*, 26 F. 3d 903 (9th Cir. 1994) the Court rejected the contention that the *Gaudet* remedy for loss of society is only recoverable by dependents and affirmed a damage award in favor of the parents of a deceased child who did not prove that they were financially dependent on the child. The Court held, in pertinent part:

> Against this background, the district court in the present case awarded the parents of the decedents substantial damages for loss of society. The reasons for doing so are straightforward and, in our view, justifiable.
>
> *Gaudet* itself authorizes recovery for loss of society in cases of wrongful death in a state's territorial waters. It is true that DOHSA and the Jones Act would not permit an award of such non-pecuniary damages, but DOHSA does not apply because the death was not on the high seas (beyond the three-mile limit), and the Jones Act does not apply because the decedents were not seamen…The government,

however, would derive a different rule from the pattern of statutes and precedent. It contends that parents may not recover damages for loss of society unless they prove that they were dependent on their deceased child. … The government also relies on the emphasis on uniformity that pervades both *Higginbotham* and *Miles*, as well as the statement in *Miles* that "an admiralty court should look primarily to [state and federal] legislative enactments for policy guidance." *Miles*, 498 U.S. at 27, 111 S.Ct. at 323. From these pronouncements, the government extracts a rule that, in the interest of uniformity between DOHSA and Jones Act on the one hand and the law applicable to territorial waters on the other, would permit recovery for loss of society only to parents who were dependent upon their decedents. We are not convinced by the government's reasoning. The footnote in *Higginbotham* is indicated in a sentence of text that makes the Supreme Court's position clear: It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant, a desire for uniformity cannot override the statute. *Higginbotham*, 436 U.S. at 624, 98 S.Ct. at 2014. (footnote omitted). It is clear enough from this statement in *Higginbotham* that the Court left the law applicable to territorial-water *Moragne* actions where it found it. Its limitation of recovery under DOHSA was simply dictated by Congress, resulting in non-uniformity. …Thus, the results in *Higginbotham* and *Miles* were clearly dictated

by statute, and neither statute limits the damages recoverable for death in territorial waters that were authorized by *Gaudet*. We also do not consider controlling the Supreme Court's use of the word "dependents" at various points in *Gaudet*. Cf. *Wahlstrom*, 4 F. 3d 1084 (noting instances). We view these references merely as descriptive of the parties before the court in that case, not as a restriction on the Court's holding that loss-of-society damages are available in *Moragne* action. The *Gaudet* Court simply was not faced with the precise issue before us today, which in our view is whether these parents are proper *Moragne* Plaintiffs, entitled to recover the usual elements of damages available to such Plaintiffs. ...We also do not consider controlling the statement in *Miles* that '[t]he holding of *Gaudet* ... applies only to longshoremen.' 498 U.S. at 31, 111 S.Ct. at 325. The point that the Court was making was that *Gaudet* does not apply to seamen. As the Court earlier recognized, '*Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen.' *Id.* At 30, 111 S.Ct. at 324. Indeed, the government concedes that the rule of *Gaudet* is not confined to longshoremen when it agrees that *dependent* parents may recover loss-of-society damages in *Moragne* actions. We decline, therefore, to limit *Gaudet* by drawing an unnecessary distinction between dependent and nondependent parent Plaintiffs in *Moragne* actions for determining the availability of loss-of-society damages. As the Court noted in *Moragne*, "it better

> becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."...

26 F.3d at 915-17.

The Petitioner respectfully submits that the decision in *Sutton v. Earles*, supra, represents the correct approach to deciding the legal issue raised by this petition. As in the case *sub judice*, it better becomes the humane and liberal character of this proceeding in admiralty to give, rather than withhold, the remedy sought. To withhold non-pecuniary damages in this case would be a denial of justice to the Petitioner and would be inconsistent with this Court's rulings in *Moragne and Gaudet*.

Nevertheless, the courts below found the reasoning in *Miles v. Melrose*, 882 F. 2d 976 (5th Cir. 1989) and *Anderson v. Whitaker Corp.*, 894 F. 2d 804 (6th Cir. 1990), to be persuasive. These cases held that in order to recover for loss of society, the Plaintiff must have been financially dependent on the person who was killed. The cases also held that a denial of recovery for loss of society would lend more uniformity to admiralty jurisdiction because the Death on the High Seas Act (DOSHA), 46 U.S.C. § 761 et seq, limits recovery to pecuniary losses, and because survivors cannot recover for loss of society under the Jones Act, 46 U.S.C. § 688.

The Petitioner respectfully disagrees with the reasoning of *Miles v. Melrose*, supra, and *Anderson v. Whitaker Corp*, supra, and the lower courts' reliance thereon. The lower courts' reliance on the need for uniformity between statutory and non-statutory causes of action reflects a

misconception of the uniformity sought to be achieved by this Court's decisions from *Moragne* to *Yamaha Motor Corp.* The desirability of uniformity in the maritime law has its roots in the view, as expressed in Justice Frankfurther's concurring opinion in *Wilburn Boat Co., v. Fireman's Fund Insurance Company, Inc.*, 348 U.S. 310 (1955), that the shipping industry should not be subjected to liabilities which differ from state to state as vessels move from one port to another. Petitioner submits that this need for uniformity is inapposite to the question as to whether non-statutory maritime causes of action should be uniform with statutory maritime causes of action. It is likewise Petitioner's position that this need for uniformity has little or no application in cases such as this case which involve recreational boating accidents and do not directly involve interstate or foreign commerce. See Robert Force, "Post-Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou," 21 *Tul. Mar. L.J.* 7 (1996); Robert Force, "Tort Reform by the Judiciary: Developments in the Law of Maritime Personal Injury and Death Damages," 23 *Tul. Mar. L.J.* 351 (1999).

DENIAL OF AN ADEQUATE REMEDY IN THIS CASE REPRESENTS A STRIKING DEPARTURE FROM ELEMENTARY PRINCIPLES OF THE LAW OF REMEDIES

Petitioner respectfully submits that denial of an adequate remedy in this case represents a striking departure from elementary principles of the general maritime law of remedies, a result which this Court found offensive in *Moragne.*

Alabama law is unique to the extent that it does not provide for compensatory damages.[9] Rather, it is more

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[9] Alabama law does not prohibit an award of compensatory

generous to plaintiffs in that it provides for punitive damages upon a showing of simple negligence.[10] It is therefore entirely appropriate and necessary, the Petitioner respectfully submits, that the Alabama statutory remedy for wrongful death be supplemented with a judge-made remedy as a gap-filling measure in order to achieve the uniform vindication of the maritime law. See *Miles*, 498 U.S. at 31 ("*Moragne* involved gap filling in an area left open by statute; supplementation was entirely appropriate."). Such supplementation would comport with sound maritime policy for several reasons.

In the first place, it makes no sense for a plaintiff to be able to recover an adequate remedy for the maritime wrongful death of his child if the death occurs one (1) foot east of the Florida/Alabama line but to not be able to recover an adequate remedy if the death occurs one (1) foot west of the line. In *Gaudet*, the United States Supreme Court noted that in *Moragne* the United States Supreme Court created a "*uniform*" federal common law cause of action for maritime wrongful death. In *American Dredging Company v. Lambert*, 81 F.3d 127 (11th Cir. 1996), the Eleventh Circuit held that non-pecuniary damages for the maritime wrongful death of non-seamen can be recovered if the accident occurs in navigable waters situated in the State of Florida. However, in the case *sub judice*, the lower courts have held that if a maritime wrongful death occurs in navigable waters which

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damages but merely provides that a plaintiff's remedy is in punitive damages.

[10] The Respondents in the case sub judice claimed below that since Eleventh Circuit had held *In Re Amtrack "Sunset Limited" Train Crash,* supra, that the Alabama wrongful death statute does conflict with fundamental principles of federal admiralty law, the Petitioner is left with no adequate remedy for compensatory damages. This claim, if accepted by this Court, would effectively revive the rule of law of the *Harrisburg*, at least in the State of Alabama.

are situated in the State of Alabama the parents of a minor child who is killed may not recover non-pecuniary damages. The Petitioner respectfully submits that this anomaly conflicts with the teachings of the United States Supreme Court in *Gaudet* and *Calhoun* that *Moragne* created a "*uniform*" federal common law action for maritime wrongful death.

It thus appears that the decision of the Eleventh Circuit in the case sub judice runs squarely against the current of the Supreme Court's jurisprudence. Any ostensible reliance on "uniformity" – in the sense of giving non-seamen survivors the same remedies as those of mariners – is clearly diminished in view of the fact that Congress has not prescribed a uniform rule (as it could, and has, with DOSHA). See *Sutton v. Earles,* supra, at 916-17 (9th Cir. 1994):

> "We do not consider ourselves free to give such weight to the interest of uniformity, in light of *Gaudet's* explicit acknowledgment that it was creating a non-uniform category of damages in territorial water, Gaudet, 414 U.S. at 588 n. 22, and the acknowledgments of non-uniformity in *Higginbotham*, 436 U.S. at 624. The fact that the death of a seaman in territorial waters leads to recovery only of pecuniary damages is dictated by statute, *Miles*, 498 U.S. at 32-33, and that statute does not limit recoveries for the deaths of non-seamen." (citations omitted).

The Eleventh Circuit has thus, in the guise of judicially determining a uniform rule of the general maritime law, in fact acted contrary to the direction of the Supreme Court.

Moreover, this case implicates important policies of maritime law including the promotion of safety on inland waterways, the accountability of negligent boat operators, the necessity and desirability of providing an adequate make-whole restitutionary remedy to the parents of children killed on inland waterways, and the interest of the State of Alabama in preventing homicides. Moreover, it makes no sense to be able to recover an adequate remedy for personal injury but not for death. Nevertheless, the decisions of the lower courts do not comport with ordinary notions of justice because they effectively relieve tortfeasors of the consequences of their negligent actions and deny parents an adequate remedy for the wrongful death of their beloved teenage son.

The uniformity of remedies among the states is an important goal, as has been recognized by several decisions of this Court. The Petitioner respectfully submits that the policy need for uniformity as between statutory and non-statutory remedies is less important. In any event, uniformity for uniformity's sake should not be the ultimate goal of the law. Rather, justice should be the ultimate goal. Nevertheless, the rule of law that has been adopted in this case by the lower courts represents a striking departure from elementary principles of the general maritime law of remedies.

Petitioner, Charles Desmond Tucker, respectfully concludes that the legal issue presented by this Petition for Certiorari is of fundamental importance to maritime law and policy and should be considered and decided by this Court.

CONCLUSION

The Petition ought to be GRANTED.

Respectfully submitted,

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November 11, 2003

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-14991

CHARLES DESMOND TUCKER,

Plaintiff-Appellant,

versus

FRANK EDWARD FEARN,
JUDY FEARN,

Defendants-Appellees.

Appeal from the United Stats District Court
for the Southern District of Alabama

(June 10, 2003)

Before BIRCH and HULL, Circuit Judges, and EDENFIELD*, District Judge.

HULL, Circuit Judge:

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* Honorable B. Avant Edenfield, United States District Judge for the Southern District of Georgia, sitting by designation

In this admiralty case, plaintiff Charles Desmond Tucker seeks to recover for the death of his minor son, Charles Justin Tucker, who was killed in a boating collision. Plaintiff Tucker appeals from the district court's order precluding him from recovering loss of society damages in his wrongful death action under general maritime law. After review and oral argument, we affirm.

I. BACKGROUND

Charles Justin Tucker was traveling on a 19-foot Wellcraft power boat when his boat collided with a 36-foot Pearson sailboat operated by defendants Frank and Judy Fearn (the "Fearns") in Alabama's territorial waters. Charles Justin Tucker died as a result of injuries received in this boating collision.

Because the collision occurred in territorial waters, plaintiff Charles Desmond Tucker ("Tucker") brought this wrongful death action against the Fearns under general maritime law. Tucker sought to recover nonpecuniary damages, in the form of loss of society damages, under general maritime law.[1] Tucker also brought state law claims under Alabama's wrongful death statute, Ala.Code § 6-5-410.

The Fearns moved to strike Tucker's general maritime claim for nonpecuniary damages because he was not financially dependent on his deceased minor son. The district court entered an order granting the Fearns' motion to strike Tucker's claim for nonpecuniary damages and thereby limiting Tucker's potential recovery under general maritime law to pecuniary damages for the loss of his minor son. Subsequently, the district court certified that "this order involves a controlling question of law as to which there is substantial ground for difference of opinion." On September 13, 2002, this Court granted Tucker's petition for

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[1] Specifically, Tucker sought nonpecuniary damages for the loss of love, affection, and companionship of his deceased minor son and for his grief and anguish over his son's death.

interlocutory review under 28 U.S.C. § 1292(b).

In this interlocutory appeal, the only issue is whether Tucker, as a nondependent parent, may recover loss of society damages for the wrongful death of his minor child under general maritime law.[2] For the reasons outlined below, we conclude that the district court correctly determined that loss of society damages are not recoverable by Tucker in a wrongful death action under general maritime law.

II. DISCUSSION

To guide our analysis of this issue, we first consider the fundamental principles of admiralty law set forth by the Supreme Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), and then in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), and *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

A. Moragne: Wrongful Death under General Maritime Law

In *Moragne*, the Supreme Court overruled its earlier decision in *The Harrisburg*[3] and created a wrongful death

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[2] Whether Tucker may recover loss of society damages in a wrongful death action under general maritime law is a question of law that we review *de novo*. *See King v. Moore*, 312 F.3d 1365, 1366 (11th Cir.), *cert. denied*, 123 S.Ct. 662.

[3] 119 U.S. 199, [7 S.Ct. 140, 30 L.Ed. 358] (1886). In *The Harrisburg*, the Supreme Court "held that the general maritime law (a species of judge-made federal common law) did not afford a cause of action for wrongful death. The *Harrisburg* Court said that wrongful-death actions are statutory and may not be created by judicial decree." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (discussing *The Harrisburg*).

action under general maritime law for deaths occurring in state territorial waters.[4] In doing so, the Supreme Court noted that Congress had enacted legislation to cover some but not all types of maritime wrongful deaths. *Id.* at 397-98, 90 S.Ct. 1772. Specifically, the Death on the High Seas Act (DOHSA) had created a wrongful death action but only for all persons killed on the *high seas.* [5] 46 U.S.C.App. § 761 *et seq.* Similarly, the Jones Act provided only *seamen* a right of recovery against their employers for negligence resulting in injury or death. *Moragne,* 398 U.S. at 394, 90 S.Ct. 1772; 46 U.S.C.App. § 688. The Supreme Court observed, however, that Congress had not yet provided a statutory right of action for wrongful deaths occurring in state territorial waters. [6] *Moragne,* 398 U.S. at 397- 98, 90 S.Ct. 1772. The Supreme

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[4] *See In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993,* 121 F.3d 1421, 1428 (11th Cir.1997) (noting that "*Moragne* ... for the first time gave an admiralty common law right of action for wrongful death of non-seamen in state territorial waters"). The deceased in *Moragne* was a longshoreman. *Moragne,* 398 U.S. at 376, 90 S.Ct. 1772.

[5] DOHSA provides a cause of action "whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States." 46 U.S.C.App. § 761(a).

[6] DOHSA does not cover deaths resulting from incidents occurring within state territorial waters--that is, deaths resulting from incidents occurring within three-miles of the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States. *See Moragne,* 398 U.S. at 395, 90 S.Ct. 1772. Here, the parties do not dispute that the incident resulting in the death of Tucker's son occurred in Alabama's territorial waters. The boats were being operated in the Inter-Coastal Waterway near Orange Beach, Baldwin County, Alabama.

Court reasoned that this was because Congress saw no need for such a federal statute because the States historically provided remedies for deaths occurring in their territorial waters. *Id.* at 398, 90 S.Ct. 1772. Thus, the Supreme Court concluded that Congress's "failure to extend [DOHSA] to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute." *Id.* at 397, 90 S.Ct. 1772; *see also Miles,* 498 U.S. at 24-25, 111 S.Ct. 317.

The Supreme Court in *Moragne* then discussed at length how a "transformation" in maritime law had begun in 1944 and that the emergence of the strict liability claim of "unseaworthiness" in federal maritime law had created inconsistencies in recovery for deaths on the high seas versus recovery for deaths on territorial waters under state statutes. *See Moragne,* 398 U.S. at 399-400, 90 S Ct. 1772. Thus, the Supreme Court in *Moragne* sought to eliminate these inconsistencies and render maritime wrongful death law uniform by creating a general maritime wrongful death action applicable in all waters, including state territorial waters. *See Id.* at 401-02, 90 S.Ct. 1772.

In doing so in *Moragne,* the Supreme Court relied to a large extent on its determination that Congress enacted the Jones Act and DOHSA to further "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' " [7] *Id.* at 402, 90 S.Ct. 1772 (citation omitted). The Supreme Court further reasoned that "[o]ur recognition of a right to recover for wrongful death under general maritime

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[7] For instance, the Supreme Court stated that "the Jones Act was intended to achieve 'uniformity in the exercise of admiralty jurisdiction by giving seamen a federal right to recover from their employers for negligence regardless of the location of the injury or death." *Moragne,* 398 U.S. at 401, 90 S.Ct. 1772

law will assure uniform vindication of federal policies." [8] *Id.* at 401, 90 S.Ct. 1772.

The Supreme Court's conclusion in *Moragne* also was motivated, in part, by the maritime principle that "special solicitude [be given] for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Id.* at 387, 90 S.Ct. 1772. The Supreme Court observed that federal maritime law, as it then-existed, actually disadvantaged Jones Act seamen. *Moragne,* 398 U.S. at 395-96, 90 S.Ct. 1772. Because the Jones Act preempts state law remedies for the death or injury of a seaman, the Supreme Court remarked that the " 'strangest' anomaly" in maritime law was that a Jones Act seamen "is provided no remedy for death caused by unseaworthiness *within territorial waters,* while a [nonseaman] ... does have such a remedy when allowed by a state statute." *Id.* at 395-96, 90 S.Ct. 1772 (emphasis added). Thus, the Supreme Court's recognition of a wrongful death action under general maritime law served to remedy a disparity for seamen that had existed prior to *Moragne. See Miles,* 498 U.S. at 30, [111 S.Ct. 317.] In *Moragne,* the Supreme Court did not set forth the scope of the remedies available in a wrongful death action under general maritime law but left such development for future litigation. *Moragne,* 398 U.S. at 408, 90 S.Ct. 1772.

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[8] In *Norfolk Shipbuilding & Drydock Corp. v. Garris,* 532 U.S. 811, 820, [121 S.Ct. 1927, 150 L.Ed.2d 34 (2001)], the Supreme Court held that "[t]he maritime cause of action that *Moragne* established for unseaworthiness is equally available for negligence." In this case, plaintiff Tucker based his maritime claim on negligence rather than unseaworthiness.

B. Higginbotham: No Loss of Society Damages under DOHSA

Since *Moragne,* the Supreme Court has held that loss of society damages are not recoverable under DOHSA. *See Higginbotham,* 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581.

When the Supreme Court decided *Higginbotham,* DOHSA provided that "recovery ... shall be a fair and just compensation for *the pecuniary loss* sustained by the persons for whose benefit the suit is brought...." 46 U.S.C.App. § 762 (1975) (emphasis added).[9] The issue in *Higginbotham* was whether the explicit use of the term "pecuniary loss" implied that nonpecuniary damages were not available under DOHSA. *Higginbotham,* 436 U.S. at 619-20, 98 S.Ct. 2010. Although the Supreme Court recognized that DOHSA "does not address every issue of wrongful-death law ... [,] when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that [DOHSA] becomes meaningless." *Id.* at 625, 98 S.Ct. 2010. The Supreme Court thus concluded that Congress had "limited survivors to recovery of their pecuniary losses." *Id.* at 623, 98 S.Ct. 2010.

C. Miles: No Loss of Society Damages for Seamen Under Jones Act or General Maritime Law

In *Miles,* a unanimous Supreme Court also addressed

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[9] The current version of 46 U.S.C.App. § 762(a) is identical to § 762 as it existed at the time *Higginbotham* was decided. Since *Higginbotham,* Congress has added subsection (b) to § 762, which provides: "If the death resulted from a *commercial aviation accident* occurring on the high seas beyond 12 nautical miles from the shore of any State ... additional compensation for nonpecuniary damages for wrongful death of a decedent is recoverable." 46 U.S.C.App. § 762(b)(1).

whether recovery for loss of society damages was available for seamen under the Jones Act (based on negligence) and in a general maritime action (based on unseaworthiness). To aid its analysis of these issues, the Supreme Court "described *Moragne* at length because it exemplifies the fundamental principles that guide[d] [the Court's] decision." *Miles,* 498 U.S. at 27, 111 S.Ct. 317. Drawing from *Moragne,* the Supreme Court in *Miles* emphasized the need to look to "legislative enactments for policy guidance" and "achieve the uniform vindication of such policies[,]" stating as follows:

> We no longer live in an area when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. *In this era, an admiralty court should look primarily to these legislative enactments for policy guidance.* We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress.

Miles, 498 U.S. at 27, 111 S.Ct. 317 (emphasis added).

In *Miles,* the Supreme Court first considered whether loss of society damages were recoverable under the Jones Act. After analyzing the legislative history of the Jones Act, the Supreme Court determined that "Congress must have intended to incorporate the pecuniary limitation on damages." *Id.* at 32, 111 S.Ct. 317. Thus, the Supreme Court held that "[t]here is no recovery for loss of society in a Jones Act wrongful death action." *Id.*

The *Miles* plaintiff also presented a general maritime

claim alleging that the decedent-seaman "had been killed as a result of the unseaworthiness of the vessel." *Id.* Because this claim was brought under general maritime law, the Supreme Court's first determination that loss of society damages were precluded under the Jones Act did not decide the second issue directly. *See id.* Nevertheless, the Supreme Court looked to the Jones Act for policy guidance and concluded that "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33, 111 S.Ct. 317. The Supreme Court therefore held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." *Id.* at 33, 111 S.Ct. 317. In reaching this outcome in *Miles,* the Supreme Court noted that its decision "restore[d] a *uniform* rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Id.* (emphasis added).

D. No Loss of Society Damages for Nonseamen

Applying *Moragne, Higginbotham,* and *Miles,* we determine that nondependent survivors, such as Tucker, of nonseamen, such as Tucker's son, equally cannot recover loss of society damages in a wrongful death action under general maritime law. We start our analysis with DOHSA, which the Supreme Court has recognized as being "the courts' primary guide as they refine the nonstatutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." *Higginbotham,* 436 U.S. at 624, 98 S.Ct. 2010. In looking to DOHSA, we are particularly mindful of the Supreme Court's recent statement in *Norfolk Shipbuilding Drydock Corp. v. Garris,* 532 U.S. 811, 121 S.Ct. 1927, 150 L.Ed.2d 34 (2001),

that "[w]hile there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field." *Id.* at 820, [121 S.Ct. 1927] (internal quotation marks omitted) ("Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to Congress.").

Further, DOHSA provides a wrongful death action in favor of *anyone* killed on the high seas, but limits recoverable damages in wrongful death suits to "pecuniary loss sustained by the persons for whose benefit the suit is brought." 46 U.S.C.App. § § 761(a), 762(a). In light of this limitation, it would be inconsistent with Congress's "considered judgment" for this Court to permit the recovery that plaintiff Tucker seeks in this case under general maritime law.

Denying recovery to Tucker for loss of society damages is also consonant with the principle that courts seek a uniform vindication of federal maritime policies. It would be discordant for this Court to sanction additional remedies for deaths of nonseamen occurring in a state's territorial waters than (1) Congress has permitted under DOHSA for deaths of nonseamen occurring on the high seas, *Higginbotham,* 436 U.S. at 623, 98 S.Ct. 2010, (2) Congress has permitted for seamen under the Jones Act, *Miles,* 498 U.S. at 32, 111 S.Ct. 317, and (3) the Supreme Court has allowed for seamen under general maritime law, *Miles,* 498 U.S. at 32-33, 111 S.Ct. 317.

We are also mindful that our decision comports with the "special solicitude" that admiralty law displays for seamen. *Moragne,* 398 U.S. at 398, 90 S.Ct. 1772. A strange

anomaly would result if we were to permit the survivors of nonseamen the right to recover loss of society damages while the survivors of seamen--the traditional wards of admiralty law--are barred from such recovery under the Jones Act and general maritime law. Because neither Congress nor the Supreme Court have ever indicated that admiralty law evinces any particular consideration for nonseamen, we decline to fashion a rule that would permit their survivors a more liberal recovery under general maritime law.

E. Tucker's Gaudet arguments

Plaintiff Tucker primarily relies on the Supreme Court's decision in *Sea- Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). In *Gaudet,* the dependent widow *of a longshoreman* sought to recover loss of society damages in a wrongful death action under general maritime law. *Id.* at 585-86, 94 S.Ct. 806. The Supreme Court permitted the recovery of loss of society damages, stating that "our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." *Id.* at 588, 94 S.Ct. 806. Tucker argues that *Gaudet* is broadly written and supports the proposition that loss of society damages are recoverable by nonseamen.

One problem for Tucker, however, is that the Supreme Court since has limited the applicability of *Gaudet* to its facts. In *Miles,* the Supreme Court stated that "[t]he holding of *Gaudet* applies only in territorial waters, and it applies only to *longshoremen.*" *Miles,* 498 U.S. at 31, 111 S.Ct. 317 (emphasis added). In fact, the Supreme Court in *Miles* indicated that *Gaudet* was no longer even applicable on its facts, in view of amendments made to the Longshore and Harbor Workers' Compensation Act in 1972. *Miles,* 498 U.S.

at 30 n. 1, 111 S.Ct. 317. Consequently, as the Sixth Circuit stated in *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir.1993), "[*Gaudet*] has therefore been condemned to a kind of legal limbo: limited to its facts, inapplicable on its facts, yet not overruled."

The second hurdle for Tucker is that the plaintiff in *Gaudet* was a dependent widow, whereas Tucker is a nondependent survivor. A number of other federal circuit courts have held explicitly that nondependent survivors may not recover loss of society damages in wrongful death actions for a nonseaman's death in territorial waters. *See, e.g., Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1093 (2d Cir.1993); *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir.1990); *Miles v. Melrose,* 882 F.2d 976 (5th Cir.1989), *aff'd sub nom on other grounds, Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275. *But see Sutton v. Earles,* 26 F.3d 903 (9th Cir.1994). [10]

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[10] On appeal, the parties focus on whether *nondependents* of nonseamen killed in territorial waters may recover loss of society damages. There is a strong argument, however, that the pertinent threshold question is whether *any* survivors of nonseamen are entitled to recover loss of society damages and not whether nondependent survivors of nonseamen may recover loss of society damages. This is because (1) it would still yield an anomalous result for dependent survivors of nonseamen to have greater recovery than dependent survivors of seamen and (2) allowing dependent survivors of nonseamen to recover loss of society damages would defeat the principle of achieving uniformity in admiralty law since loss of society damages are not recoverable under DOHSA and the Jones Act. Additionally, the argument is made that an essentially pecuniary standard such as dependency should not provide the dividing line on this issue, given the nature of loss of society damages. *See Gaudet,* 414 U.S. at 585, 94 S.Ct. 806 ("The term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection."). Nonetheless, given that Tucker is a nondependent survivor, we decide today only that nondependent survivors of nonseamen cannot recover loss of society damages under general

F. Tucker's Yamaha Motor Arguments

Plaintiff Tucker also asserts that *Yamaha Motor Corp. v. Calhoun,* 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996), allows for the recovery of loss of society damages in this case. However, *Yamaha Motor* has no application to the issue here because it concerns the remedies available under a *state* 's wrongful death statute and not the shape of the wrongful death action under *federal* general maritime law.

In *Yamaha Motor,* a twelve-year old girl was killed in a recreational jet ski accident in the territorial waters of Puerto Rico. *Id.* at 201-02, 116 S.Ct. 619. Her parents brought suit under Pennsylvania's wrongful death statute and sought recovery of loss of society damages. *Id.* at 202, 116 S.Ct. 619. The Supreme Court concluded that "the damages available for the jet ski death of [the girl] are properly governed by state law." *Id.* at 216, 116 S.Ct. 619.

Tucker's reliance on *Yamaha Motor* is misguided because that decision does not support the assertion that *federal* maritime law provides for loss of society recovery in this case. Rather, the significance of *Yamaha Motor* is how the Supreme Court concluded that DOHSA did not displace the application of state law in territorial waters and "preserve[d] the application of state statutes to deaths within territorial waters." *Id.* at 216, 215 n. 13, 116 S.Ct. 619 ("Federal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters."). As this Court stated in *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on*

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maritime law.

September 22, 1993, 121 F.3d 1421, 1426 (11th Cir.1997), "[i]t goes without saying that the State of Alabama has a sovereign interest in activities that occur within its territorial waters." In light of the State's interest, a State might offer a remedial scheme independent of, and more generous than, what federal law provides, so long as it is not in conflict with federal policies. [11] *Yamaha Motor,* 516 U.S. at 215, 116 S.Ct. 619 (citing *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715, 724, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980). Thus, *Yamaha Motor* concerns the applicability of *state* wrongful death statutes and does not contradict the Supreme Court's concerns in *Miles* and *Moragne* that courts achieve a uniform vindication of *federal* maritime policies.

Consequently, *Yamaha Motor* does not speak to Tucker's general maritime claims but would assist Tucker's separate *state* law claims only if Alabama's wrongful death statute permitted the recovery of loss of society damages.[12]

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[11] The only restriction on the States' regulation of maritime affairs within their territorial waters is that "[p]ermissible state regulation ... must be consistent with federal maritime principles and policies." *Yamaha Motor,* 516 U.S. at 215 n. 13, 116 S.Ct. 619; *see In re Amtrak,* 121 F.3d at 1427 (concluding that although plaintiff had wrongful death action under Alabama's statute, "the federal maritime interests present in this action outweigh Alabama's interests in having its wrongful death statute apply in its entirety " and concluding that "applying the Alabama wrongful death act in this case so as to allow recovery for wrongful death based upon simple negligence only would deprive the litigants of substantive admiralty rights that must be applied given the exceedingly commercial nature of this incident") (emphasis added). It is noteworthy that *Yamaha Motor* involved a recreational jet ski accident, whereas *In re Amtrak* involved a traditionally commercial maritime incident. *Yamaha Motor,* 516 U.S. at 201, 116 S.Ct. 619; *In re Amtrak,* 121 F.3d at 1422-23.

[12] Tucker's reliance on *American Dredging Co. v. Lambert,* 81 F.3d 127 (11th Cir.1996), also is misplaced. *American Dredging* involved the deaths of nonseamen in Florida's territorial waters; the collision was between a floating dredge pipeline and a motorboat with four passengers,

However, such recovery is not provided for by that statute either. [13] *See* Ala.Code. § 6-5-410.

III. CONCLUSION

For the reasons stated above, we affirm the district court's order precluding plaintiff Tucker, a nondependent survivor, from recovering loss of society damages in his wrongful death action under general maritime law for the death of his nonseaman son.

AFFIRMED.

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three of whom died. *Id.* at 128. Although the personal representatives of the deceased nonseamen in *American Dredging* did file claims under general maritime law, the issue on appeal focused on whether nonpecuniary damages were recoverable under Florida law. In *American Dredging*, this Court permitted recovery of nonpecuniary damages under *Florida's wrongful death statutes* because "federal maritime law does not displace *state* wrongful death and survival statutes permitting non-pecuniary damages in wrongful death actions arising out of accidents in territorial waters" and "no federal statute or common law precedent precludes the personal representatives from recovering non-pecuniary damages under Florida law." *Id.* at 130-31. The decision did not outline what nonpecuniary damages were sought. *American Dredging* also did not appear to involve punitive damages, which were at issue in *In re Amtrak.*

[13] Tucker's complaint did seek recovery of punitive damages under Alabama's wrongful death statute. However, subsequent to the order at issue in this interlocutory appeal, the district court granted summary judgment to the defendant Fearns on plaintiff Tucker's punitive damages claims under state law. The district court determined that punitive damages under Alabama's wrongful death statute were not recoverable in light of this Court's decision in *In re Amtrak,* 121 F.3d 1421. The district court's determination is not before this Court on interlocutory appeal, and we express no opinion on that issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 00-0942-CG-L

CHARLES DESMOND TUCKER, as custodial parent and personal representative of CHARLES JUSTIN TUCKER, a deceased minor and CHARLES DESMOND TUCKER, Individually,	)
Plaintiff,	)
vs.	)
FRANK EDWARD FERN and JUDY FEARN,	)
Defendants,	)

ORDER

This cause is before the court on the motion of defendants to strike plaintiff's claim for nonpecuniary damages. (Doc. 39). The court finds that because the plaintiff is not a dependent of decedent, defendant's motion to strike is due to be granted.

FACTS

This is a wrongful death action arising out of a boating collision between a 19 foot Wellcraft power boat and a 36 foot Pearson sailboat on the Inter-Coastal Waterway near Orange Beach, Baldwin County, Alabama. Charles Justin Tucker, a minor, died as a result of injuries received in the boating collision. A pretrial conference was held on June 27, 2002. At the pretrial conference the parties agreed count II of plaintiff's complaint was due to be dismissed in light of the precedent established by *In Re Amtrack "Sunset Limited". Train Crash*, 121 F.3d 1421, 1428 (11th Cir. 1997), *cert denied*, 522 U.S. 1110 (1998), which held that Alabama's wrongful death statute conflicted with general maritime policies and as such was not applicable to maritime cases. Defendants subsequently filed this motion to strike plaintiff's claims for damages for loss of love, affection, and companionship of plaintiff's decedent and grief and anguish over the death of plaintiff's decedent.

LEGAL ANALYSIS

Because this case involves a collision between two boats on navigable water, "it falls within admiralty's domain." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206 (1996). While the exercise of admiralty jurisdiction "does not result in automatic displacement of state law", Id., the Eleventh Circuit held *In Re Amtrack, supra*, that Alabama's wrongful death statute conflicted with maritime law. The *Amtrack* court, after weighing the competing interests of the conflicting laws, determined that the Alabama statute was not applicable to claims governed by federal maritime law. As a result, unless another statute is applicable, a plaintiff in a maritime wrongful death action may only resort to damages provided by general maritime law.

Plaintiff suggests that there exists a federal common law right of action for the wrongful death of non-seamen in state territorial waters under which plaintiff is entitled to recover nonpecuniary damages. The Supreme Court of the United States initially held in *The Harrisburg*, 119 U.S. 199 (1886) that general maritime law did not afford a cause of action for wrongful death. The *Harrisburg* Court found that wrongful death actions are statutory and may not be created by judicial decree. Since then, although the Supreme Court had generally refused to give effect to state laws regarded as inconsonant with the substance of federal maritime law, it concluded that extending state wrongful death statutes to federal maritime claims was compatible with substantive maritime policies. *Yamaha Motor Corp.*, 516 U.S. at 206. However, as stated above, state law wrongful death remedies are not available in Alabama pursuant to *Amtrack*. The Supreme Court again addressed the issue of whether a wrongful death action would lie under general maritime law in *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970). The *Moragne* Court found that Congress had not indicated an intent to preclude the judicial allowance of a wrongful death remedy to non-seaman in territorial waters. *Id.* at 393. The court noted that "[w]here death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases." *Id.* *Moragne* overruled *Harrisburg* and held that an action does lie under general maritime law for death caused by violation of maritime duties. *Id.* at 409. However, the *Moragne* Court did not specifically address what remedies were available in such an action.

Plaintiff cites *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) as support for the contention that loss of support, services, and society, as well as funeral damages,

may be recovered by a decedent's dependents under general maritime law in wrongful death actions involving non-seamen. Plaintiff further contends that under *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), those remedies are not only available to persons who were financially dependent on the decedent but to the parents of a deceased child as well. The Ninth Circuit viewed the reference in *Gaudet* to "dependents" as merely "descriptive of the parties before the court in that case, not as a restriction on the Court's holding that loss-of–society damages are available in *Moragne* actions." *Sutton*, 26 F.3d at 917. However, the Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), limited the holding in *Gaudet*. The *Miles* Court ruled that "*Gaudet* applies only in territorial waters, and it applies only to longshoremen." *Miles,* 498 U.S. at 31. *Miles* held that a seaman cannot recover loss of society in a wrongful death action under general maritime law. *Id.* at 37. The *Miles* Court bases its decision primarily on the fact that the Jones Act, 46 U.S.C. App.§ 688, applies when a seaman has been killed as a result of negligence and limits recovery to pecuniary loss. The decedent in *Miles* had been killed as a result of the unseaworthiness of the vessel. The Court reasoned that it would be inconsistent "to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33. These cases leave unsettled the damages available where, as here, a person who is neither a seaman nor a longshoreman is killed in territorial waters.

Defendant maintains that even if we were to extend *Gaudet* to non-seamen, plaintiff still would not be able to recover nonpecuniary damages because plaintiff was never a dependent of his deceased son. Defendant claims that plaintiff is erroneous in his contention that the *Gaudet* Court's use of the word "dependent" was merely descriptive. Defendant

asserts that the Ninth Circuit case upon which plaintiff relies, *Sutton*, is ill reasoned. Black's Law Dictionary defines "dependent" as "[o]ne who relies on another for support; not one able to exist or sustain oneself without the power or aid of someone else." BLACK LAW DICTIONARY 449 (7th ed. 1999). The Fifth and Sixth Circuits have held that to recover for loss of society, the plaintiff must be financially dependent. See *Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989) ("in a general maritime wrongful death action nondependent parents may not recover for loss of society whether or not their deceased children were survived by spouse or child"); *Anderson v. Whittaker Corp.*, 894 F.2d 804, 812 (6th Cir. 1990) ("We believe [the language in *Gaudet*] indicates that the Supreme Court would deny recovery for loss of society damages by a non-dependent parent."). The *Melrose* case concluded that a denial of recovery would lend more uniformity to admiralty jurisdiction because the Death on the High Seas Act, 46 U.S.C. App. § 761 et seq., (DOHSA), limits recovery to pecuniary losses, and because survivors cannot recover for loss of society under the Jones Act, 46 U.S.C.App.§ 688. *Miles v. Melrose*, 882 F.2d at 987-88. The *Anderson* case cited to the reasoning of *Melrose* and added that the language in *Gaudet* indicates that the Supreme Court would deny recovery for loss of society damages by a non-dependent parent. Specifically Anderson quoted the following language from *Gaudet*:

> [I]n the cases of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to *him – usually spouse and* children – seek to recover for their total loss of one *on whom they depended.* Since the policy underlying the remedy is to insure compensation *of the dependents* for their losses resulting from the decedent's death, the remedy should not be precluded merely because the decedent, during his lifetime, is able to

obtain a judgment for his own personal injuries. *Anderson*, 894 F.2d at 811 (emphasis in original) (citations omitted). This court finds the reasoning expressed in *Melrose* and *Anderson* persuasive.

CONCLUSION

Because decedent's parents were not dependent on decedent, the defendants' motion to strike plaintiff's claims for nonpecuniary damages is GRANTED, and plaintiff's claims for damages for loss of love, affection, and companionship of plaintiff's decedent and grief and anguish over the death of plaintiff's decedent are hereby STRICKEN.[1]

DONE and ORDERED this 16th day of July, 2002.

/s/ Callie V.S. Granade

CALLIE V.S. GRANADE
UNITED STATES DISTRICT JUDGE

[1] Because the fact that plaintiff is not a dependent of decedent is dispositive of this motion, the court makes no ruling as to whether or not a dependent plaintiff would be entitled to nonpecuniary damages for the wrongful death of a non-seaman in the territorial waters of Alabama.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14991-EE

CHARLES DESMOND TUCKER,

Plaintiff- Appellant,

Versus

FRANK EDWARD FEARN,
JUDY FEARN,

Defendant – Appellees.

On Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION (S) FOR REHEARING AND PETITION (S) FOR REHEARING EN BANC
(Opinion _____, 11TH Cir., 19___, _____F.2d_____).

Before: BIRCH and HULL, Circuit Judges, and ENDENFIELD*, District Judge.

PER CURIAM:
The Petition (s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition (s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull

UNITED STATES CIRCUIT JUDGE

*Honorable B. Avant Edenfield, United States District Judge for the Southern District of Georgia, sitting by designation

Dated: August 15, 2003, Thomas K. Kahn, Clerk, U.S. Court of Appeals, Eleventh Circuit.

(2)

No. 03-718

SUPREME COURT, U.S.
FILED
DEC 16 2003
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In The

Supreme Court of the United States

CHARLES DESMOND TUCKER,

Petitioner,

v.

FRANK EDWARD FEARN and JUDY FEARN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

1. Whether the District Court correctly followed precedent in ruling that non-dependent parents of a non-seafarer killed within Alabama territorial waters may not recover non-pecuniary damages under general admiralty law.

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents Frank Edward Fearn and Judy Fearn (collectively "Fearn") submit that the Petition for Writ of Certiorari ("Pet.") filed by Petitioners is due to be denied.

STATEMENT OF THE CASE

This is a wrongful death action arising out of a boating collision between a 19' Wellcraft power boat and a 36' Pearson sailboat on the intra-coastal waterway near Orange Beach, Baldwin County, Alabama. At the time of the collision, the Wellcraft was occupied by two minors, J.R. Rinaudo and Charles Justin Tucker (Petitioners/ Plaintiffs' decedent herein)

At approximately 7:00 p.m. on the evening of October 23, 1998, Frank Fearn and his wife Judy were traveling eastward on the intra-coastal waterway under power utilizing the Pearson's inboard diesel engine. Mr. Fearn's position was to the southside of the intra-coastal waterway or, on a course starboard to the centerline of the intra-coastal waterway.

The accident occurred on a bend in the intra-coastal waterway. An independent witness, John Kennedy, testified that he was proceeding west in his car on the Canal Road which runs parallel to that portion of the intra-coastal waterway near where the accident occurred. At that time, he observed the Wellcraft boat as it sped westbound on the intra-coastal waterway, approaching the Fearn's sailboat. According to Mr. Kennedy, it appeared to him that the Wellcraft boat was attempting to "pace" his

speed. Mr. Kennedy estimates that the Wellcraft boat was traveling at approximately 45 mph in darkened conditions.

As the Wellcraft rounded the slight bend in the channel, it crossed the centerline of the intra-coastal waterway, traveled in the south part of the channel and collided with the Fearn's sailboat. Charles Justin Tucker died as a result of the injuries he received in this boating collision.

REASONS FOR DENYING THE WRIT

I. General Maritime law holds that non-pecuniary damages are unavailable to non-dependents of a non-seaman in a wrongful death action where the death occurs in state territorial waters.

The general maritime wrongful death action for a breach of maritime duties was created in *Moragne v. States Maine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed. 2d 339 (1970). As noted by the lower court, *Moragne* never set out the specific remedies available in that case but merely created the available action. Prior to the holding in *Moragne* the dependent of the decedent seaman or longshoreman killed within state territorial waters would have no available action while the same death outside the state territorial waters would have available remedies through the Death on the High Seas Act, U.S.C. Appx. §§761 et seq. (hereinafter "DOSHA") and the Jones Act, 486 U.S.C. Appx. §688. These two statutes were originally created to provide remedies for losses incurred by a decedent's dependents. *Moragne* also relied heavily on those two statutes to support the creation of a wrongful

death action under general maritime law. This wrongful death cause of action under general maritime law was created to continue congressional intent as evidenced in the Jones Acts and DOSHA where all the beneficiaries were dependents of the decedent.

The Petitioner is correct in that *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806, 39 L.Ed. 2d 9 (1974) (hereinafter "*Gaudet*") allowed the dependent widow of a longshoreman to recover damages for loss of support, services and society. What Petitioner does not mention is that the support, services and society were allowed in that case based on the policy that dependents should recover for losses resulting from their dependance on the decedent. *Id.* at 583. The uniformity of *Moragne*, DOSHA and the Jones Acts was violated by the *Gaudet* ruling. This aberration was duly noted in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 112 L.Ed. 2d 275, 111 S. Ct. 317 (1990) (hereinafter referred to as "*Miles*"). As noted by the lower court in the case *sub judice,* the Supreme Court in *Miles* limited *Gaudet* to longshoreman only, thus, restricting the aberration. The Court in *Miles* stated: "the explicit limitation (in DOSHA) precludes recovery for non-pecuniary loss, such as loss of society, in a general maritime action". *Miles* at 290. The Petitioner's reliance upon *Gaudet* is misplaced due to the fact that the case *sub judice* does not involve longshoreman killed in state territorial waters. *Gaudet* is not authoritative on the issue presently before the court. Further, *Miles* has decisively held that it would be inconsistent to allow non-pecuniary recovery in a death of a seaman within state territorial waters where the Jones Act precludes the same recovery outside state territorial waters. *Id.* at 291.

II. Alabama's wrongful death statute requires that general maritime law apply where the death of a non-seafarer occurs within Alabama's territorial waters.

Maritime wrongful death causes of action led eventually to the holding in *Yamaha Motor Corp., et al. v. Calhoun*, 516 U.S. 199, 116 Sup. Ct. 619, 133 L.Ed. 2d 578 (1996) (hereinafter referred to as "*Yamaha*"). *Yamaha* reviewed whether the federal maritime claim for wrongful death recognized originally in *Moragne* constituted the exclusive remedy in cases where a death of a non-seafarer occurred in territorial waters. *Yamaha* held that within territorial waters, where DOSHA or the Jones Act did not apply, state wrongful death statutes would be applicable. *Yamaha* at 213. The damages would therefore be properly governed by state law. *Id.* Logically, if non-pecuniary damages were available under general maritime law, then the plaintiff in *Yamaha* would not have been relegated to requesting the application of state law. There is no recovery for non-dependents of non-pecuniary losses as evidenced by the application of state law in *Yamaha*.

Alabama's wrongful death statute is not available for application in the maritime context because of the holding in *Re: Amtrak "Sunset Limited"* Train Crash, 121 F.3d 1421 (11th Cir. 1997). The court in *Amtrak* held that Alabama's wrongful death statute conflicted with general maritime law in two significant ways: only punitive damages could be awarded and Alabama strictly forbids the application of apportioned fault. *Amtrak* also held that there was no recovery for non-pecuniary damages for non-dependents in a personal injury claim thereby affirming the line of cases holding same.

III. Petitioner's reliance upon *Sutton v. Earles* is misplaced.

Ten percent of the Petitioner's brief is taken up by a quotation from *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994). However, the *Sutton* decision has found disfavor in the Fifth Circuit. The Court's reversal and remand with instructions to reconsider its award of loss of society damages in light of recent U.S. Supreme Court decisions resulted in *Walker v. Braus*, 861 F.Supp. 527, 1995 A.M.C. 1516 (E.D. La. 1994).[1] The Eastern District Court thereby declined to follow *Sutton* and ruled that *Sutton* was inconsistent with the general maritime aim of creating uniformity under admiralty law with respect to the recovery of damages of those injured or killed on navigable waters. The court stated:

> The Court declines to follow *Sutton* because it is inconsistent with the Supreme Court's decision in *Miles* and with the trend within the 5th Circuit towards eliminating loss of society damages under general maritime law. To begin with, *Sutton* creates a non-uniform recovery within the 9th Circuit, precisely what the Supreme Court counseled against in *Miles*. Just one year ago, in *Smith v. Trinidad*, 992 F.2d 996 (9th Cir. 1993), the 9th Circuit held that uniformity requirement in *Miles* compelled that conclusion that the spouse of an injured seaman may not recover loss of society damages under general maritime law. See also *Newhouse v. United States*, 844 F.Supp. 1389, 1393-94 (D.Nevada 1994) (beneficiaries of non-seaman killed in state territorial waters

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[1] See *Walker v. Braus*, 995 F.2d 77 (5th Cir. La. 1993)

> cannot recover non-pecuniary damages such as future economic loss in a survival action because *Miles* "has limited the availability of damages under *Moragne* wrongful death action to those that reflect pecuniary losses) *Sutton* therefore creates an anomaly within the 9th Circuit: the beneficiaries of seaman – traditionally the wards of admiralty – cannot recovery damages that beneficiaries of non-seaman are permitted to recover. The Supreme Court's decision in *Miles* was designed to eliminate these kinds of inconsistent results. *Miles*, 498 U.S. at 30-33, 111 Sup. Ct. at 324-26. Finally, the trend within the 5th Circuit is clearly in the direction of the eliminated loss of society as an element of damages in all maritime cases. Therefore in the interest of uniformity, this court follows that trend and declines to follow *Sutton*.

Id. 861 F.Supp. at 536-37.

Importantly, neither *Yamaha* nor *Amtrak* rely on *Sutton's* rationale. *Sutton* is not even cited in *Amtrak*, where one of the issues was specifically whether non-pecuniary damages were recoverable in personal injury accidents. If *Sutton* was at all favored by the court, mention would have been made of it in *Amtrak*, where wrongful death and personal injuries were both involved.

IV. The two guiding principles of maritime law, special solicitation to seafarers and uniformity, demand the lower court's ruling be affirmed.

The law of remedies that the petitioner relies upon must be subservient to the two guiding principles in maritime actions. Without the principles of the actions

that are created under maritime law, there are no remedies. As such, the two guiding principles of maritime actions must take precedent. The first is that individuals who work upon the dangerous seas are given special solicitude. See *Moragne*, 398 U.S. at 387 (1970). The second is the importance of uniformity in the application of maritime law. These two principles are the reasons for *Moragne's* creation of a general maritime action for wrongful deaths. The seaman who is within territorial waters but not covered by the Jones Act or DOSHA did not have a cause of action prior to *Moragne*. Through the creation of said wrongful death action, uniformity was reinforced. The special solicitude given over to seaman was also reinforced by this action. Therefore, the guiding principles of maritime law called for the creation of a wrongful death action. In fact, the court in *Miles* reviewed the two driving principles of maritime law to find "there is no recovery for loss of society and a general maritime action for the death of a Jones Act Seaman". *Id.* at 291.

The limitations set upon *Gaudet* and the uniformity of general maritime law created by *Miles* was noted in *Anderson v. Wood Acre Corp.*, 894 F.2d 804 (6th Cir. 1990) (hereinafter referred to as "*Anderson*"). *Anderson* stated that the denial of recovery of non-pecuniary damages met both aims of maritime law. *Id.* at 811. The *Miles* court harmonized the general maritime law and DOSHA and thereby satisfied the uniformity principle while the doctrine of special solicitude was furthered by not allowing recovery for loss of society. *Id.* at 811.

In terms of public policy, if the wrongful death of a recreational boater is given more remedies than that of the seaman, as proposed by the Petitioner, the doctrine of special solicitude will be completely destroyed. In order to

retain the guiding principles of special solicitude and give the Petitioner their requested remedy, Congress would necessarily have to redraft DOSHA and the Jones Act to create recovery for loss of society. Furthermore, there is no split in the decisions from the Circuit Courts. The *Miles* sets precedent and resolves this issue for all the Circuit Courts. Of the two cases that the Petitioner cites as splitting the decisions in the Circuit: *Randall v. Chevron*, 13 F.3d 888 (5th Cir. 1994) was overruled without qualification by *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 at 909 (5th Cir. 1999), and *Blome v. Aero Spatiale Helicopter Corp.*, 924 F.Supp. (805 S.D. TX 1997) held that the Texas wrongful death statute applied. Therefore, both *Blome* and *Randall* are inapposite to the case *sub judice*. The decisions regarding this issue are not split and were resolved by both *Miles* and the *Amtrak* cases.

Petitioners offer a somewhat tortured interpretation of uniformity within their Petition. Petitioners argue that the uniformity of maritime law between the states is of paramount importance. They argue that the uniformity between the statutory maritime law and the non-statutory general maritime law is not important. In effect, the Petitioners want to overrule the *Yamaha* case and not allow states to control wrongful death in their territorial waters. At the same time, Petitioners believe that if the general maritime law and the statutory laws created by Congress diverged there would be less concern.

Respondent submits that the general maritime law should reflect congressional intent as much as possible in order to retain uniformity throughout the nation. Conflict can be resolved on a state by state basis. The *Yamaha* holding demands that each state be given the opportunity to resolve conflicts where their own territorial waters are

concerned. Due to the *Amtrak Sunset Limited* case, Alabama is unique in that its wrongful death statute conflicts directly with general maritime law. Alabama therefore has the option to amend the wrongful death statute so as to comply with general maritime law or resolve itself to the remedies allowed by general maritime law. The general maritime law is uniform. It is consistent with the congressional intent as evidenced by the DOSHA and Jones act. The inconsistency in the case *sub judice* arises from the state's choice not to resolve the conflict with general maritime law.

Petitioners further suggest that general maritime law has recognized the availability of loss of society for wrongful death since *Moragne* in 1970. If general maritime law recognized such a remedy, a case would have arisen in the 33 years since *Moragne*. In fact, such remedy has not been recognized by any court relevant to the case *sub judice*.

CONCLUSION

This issue is not of imperative public importance. The issue has arisen due to Alabama's unique Wrongful Death Statute. The conflict between it and general maritime law effects only Alabama territorial waters. As such the impact of this issue is short-reaching. Further, the issue is moot due to general maritime law. The general maritime law established by the line of cases that start with *Moragne* and goes through *Miles, Yamaha* and *Amtrak* law is clear:

non-pecuniary damages are unavailable to non-dependents of a non-seafarer killed within Alabama territorial waters.

For the foregoing reasons, petition should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

CHARLES DESMOND TUCKER,

Petitioner,

v.

FRANK EDWARD FEARN and
JUDY FEARN

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioner, Charles Desmond Tucker, respectfully submits this Reply to Respondent's Brief in Opposition ["Op. Cert."].

ARGUMENT

Petitioner will not reply to Respondents' lengthy discussion (Op. Cert. 2-9) on the merits of the Question Presented to this Court. There will be additional opportunities for that, should the Court in the wise exercise of its discretion decide to grant review here. Nor is there any need to comment further on the manifest split in the circuits on the issue raised here, Respondents having conceded (Op. Cert. 5-6) that the decision below is in conflict with the jurisprudence of at least one other court of appeal. Lastly, Respondents appear to agree with Petitioner (Op. Cert. 2-3, 6-9) that this case arises as the natural consequence of this Court's previous rulings in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); and *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (2001).

1. Petitioner cannot let go unremarked, however, Respondents' suggestion (Op. Cert. 9) that the issue presented here is confined to the unique circumstances of this case, or to the peculiar interplay between the general maritime law and Alabama's wrongful death statute. It is true that the denial of Petitioners' general maritime law claim for loss of society

damages has particularly detrimental effects here. That is because Alabama's wrongful death statute has been found, by at least one federal court, see *In Re Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421 (11th Cir. 1997), to be preempted by the general maritime law. But putting aside the point that loss of society damages for deaths occurring on Alabama's state waters were eliminated as a matter of federal preemption (thus at least implicating the Question Presented here), Alabama would be hardly "unique," Op. Cert. 9, in denying recovery for that class of non-pecuniary damages. See *Mahoney v. Lensink*, 550 A.2d 1088 (Conn. App. 1988); *Siciliano v. Capitol City Shows, Inc.*, 475 A.2d 19 (N.H. 1984); *Wilson v. Wylie*, 518 P.2d 1213 (N.M. App. 1973).

In any event, the sweeping denial of loss of society damages under the general maritime law to the non-dependent parents of non-seamen killed in state territorial waters (and thus beyond the scope of the Death on the High Seas Act, 46 U.S.C. § 761) potentially impacts thousands of recreational boaters and non-recreational mariners (not otherwise falling within the class of seamen under the Jones Act, 46 U.S.C. § 688, or under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.) on state navigable waters around the nation. The rule enunciated by the court below would deny loss of society damages to the families of *any* non-seamen killed in state waters. It hardly matters whether parallel state law remedies would grant recovery for such damages or not. Indeed, the fact that the vast majority of states *do* provide for such loss of society damages for the parents on non-dependent minors, counsels in favor of an equivalent remedy under the general maritime law. That Alabama denies such a remedy merely accentuates the incongruity and irrationality of the result reached below.

2. Nor can it be regarded as credible Respondents' assertion, Op. Cert. 8, that petitioners seek to overturn this Court's ruling in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). Petitioner is of course mindful of the parallel set of remedies available under the general maritime law and under state tort law (including wrongful death statutes) where a non-mariner is killed in state waters. But this Court's decision in *Yamaha* was narrowly drawn as not to work a reverse-preemption of state law remedies over those afforded by the general maritime law. See id. at 211 n.8 ("We attempt no grand synthesis or reconciliation of our precedent today, but confine our inquiry to the modest question whether it was *Moragne*' design to terminate recourse to state remedies when nonseafarers meet death in territorial waters.").

Obviously, in the event the Court grants review here, the parties will join issue on the extent to which uniformity of the maritime law requires the availability of loss of society damages for the deaths of non-dependent minors who are not seamen, even where state tort law does not provide such a remedy. Suffice it to say here that but for the Eleventh Circuit's erroneous holdings in the case below loss of society damages for the deaths of non-dependent minors on state territorial waters would be recognized under the general maritime law.

CONCLUSION

For the foregoing reasons, along with those earlier presented, the Petition should be granted.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES DESMOND TUCKER,

Petitioner

V.

FRANK EDWARD FEARN and
JUDY FEARN

On Petition For a Writ of Certiori
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ALABAMA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Eleventh Circuit erred in its application of the maritime wrongful death remedy to this pleasure boat accident, in lieu of the Alabama Wrongful Death Act, by holding that the parents in this case may not recover damages for the loss of the society and companionship of their minor son, merely because they were not dependent on him.

CONSENT OF PARTIES

Pursuant to Rule 37(2)(a) of the Supreme Court Rules, this Brief *Amicus Curie* is being filed with the written consent of all parties to the case, which are being filed herewith.

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STATEMENT OF INTEREST

This Brief *Amicus Curiae* is submitted by the Alabama Trial Lawyers Association, a statewide bar association consisting of about 2000 lawyers who primarily represent plaintiffs in personal injury and death litigation and workers compensation claims.

The pending case is of great importance in that it determines the damages recoverable by the families of persons killed in a significant majority of pleasure boat accidents occurring on navigable waters within the State of Alabama. This case presents a question of law of particular interest to the citizens of Alabama, as a result of the decision of the Supreme Court in *Yamaha Motor Corp., U.S.A., v. Calhoun, U.S.A.*, 516 U.S. 199 (1996), permitting the application of state wrongful death damage remedies in cases not governed by the Jones Act or the Death on the High Seas Act, followed by the decision of the Eleventh Circuit in *In Re Amtrak "Sunset Limited" Train Crash*, 121 F. 3d 1421 (11th Cir. 1997), holding that the Alabama wrongful death statute could not be applied because it conflicted with established maritime law principles. That case specifically held that the families of the decedents were entitled to recover the damages allowed under *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which include damages for the loss of the services and society of the deceased.

The decision in this case will affect the outcome of many other pleasure boat wrongful death cases now pending in state and federal courts in Alabama, and which will be brought in the future, since these case do not arise out of employment, a significant number of these cases will involve children, young adults without children, and mature adults whose children are grown and no longer dependent on them.

ARGUMENT

We respectfully urge the Court to grant certiorari to consider whether the Eleventh Circuit erred in holding that the general maritime law does not allow the parents of a minor child killed in a pleasure boat accident to recover damages for the loss of his society, and thereby resolve a conflict among the Circuits on this issue. On the question presented, the court below is in direct conflict with the Ninth Circuit decision in *Sutton v. Earles,* 26 F.3d 903 (9th Cir. 1994). We also believe that the Eleventh Circuit has placed itself in conflict with the decision of the Fourth Circuit in *Garris v. Norfolk Drydock & Shipbuilding Corp.,* 210 F.3d 209 (4th Cir. 2000), and the affirming decision of this Court in *Norfolk Drydock & Shipbuilding Corp.,* 532 U.S. 811 (2001), as discussed below.

We believe that the District Court and the Eleventh Circuit were in error in their interpretation of general maritime law because they relied upon decisions which were based upon the restrictions on damages recoverable for wrongful death under the Jones Act, 46 U.S.C. §688, and the Death on the High Seas Act, 46 U.S.C. §761, et seq., when those statutes have no application at all in this case.

The recovery of non-pecuniary damages is not inimical to the general maritime law. Loss of society damages have been awarded in all types of maritime death cases since the Supreme Court decision in *Sea-Land Services, Inc., v. Gaudet*, 414 U.S. 573 (1974), where the Court specifically held that loss of society damages were recoverable in the general maritime law cause of action for wrongful death recognized in *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970).

The only prohibition of non-pecuniary damages has come in cases governed by federal statutes which restrict the beneficiaries to

claims for economic loss resulting from the death of the decedent. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), this Court held that since the Death on the High Seas Act restricted beneficiaries to pecuniary losses, loss of society damages could not be permitted in a case governed by that statute. In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the Court held that since the wrongful death remedy based upon negligence under the Jones Act had been interpreted as allowing only the recovery of financial losses, the Court could not allow the recovery of loss of society damages under the companion cause of action for unseaworthiness under the general maritime law.

However, nearly all cases have since held that non-pecuniary damages, including loss of society, are recoverable in cases where the death occurs in state waters not governed by the Death on the High Seas act, and does not involve a claim against the seaman's employer governed by the Jones Act. See, generally, the article by professor Robert Force written before the more recent Supreme Court decisions discussed infra: Force , *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Tort Cases*, 55 La. Law Rev. 745 (1995). See also the extensive discussion of this question by *In re Denet Towing Service, Inc.*, 1999 U.S. Dist. Lexis 8058 (E.D. La. 1999), where the court stated:

> "This court joins other courts that have studied the issue and found no basis to extend Miles beyond the seaman-employer relationship. *Rebstock v. Sonat Offshore Drilling*, 764 F. Supp. 75 (E.D. La. 1991); *Verdin v. L&M Bo-Truc Rental, Inc.*, 1991 U.S. Dist. LEXIS 7057, 1992 AMC 93 (E.D. La. 1991); *Gerdes v. G&H Towing Co.*, 967 F. Supp. 943 (S.D. Tex. 1997); *Sugden v. Puget Sound Tug & Barge Co.*, 796 F.

> Supp. 455 (W.D. Wash. 1992); *Emery v. Rock Island Boatworks*, 847 F. Supp. 114 (C.D. Ill. 1994); *Mussa v. Cleveland Tankers*, 802 F. Supp. 84 (E.D. Mich. 1992) (related case to *Petition of Cleveland Tankers, Inc.*, 843 F. Supp. 1157 (E.D. Mich. 1994)). Because the Jones Act forecloses recovery for non-pecuniary loss in general maritime law cases only with respect to the relationship between a seaman and his employer, a seaman's status is relevant only in actions under the Jones Act or, after Miles, under the general maritime law against his employer. The Jones Act has no bearing on plaintiff's claim against Denet, a third party tortfeasor. As far as Denet is concerned, in the determination of which elements of damages decedent's estate is entitled to recover, it should make no difference whether the decedent was a seaman, a longshoreman or a passenger. Thus, there is no need for uniform treatment of an employer and a third party tortfeasor where there is no statutory remedy that is different than the general maritime law remedy." [Id. at 9-10]

By indicating that it was inclined to rule that loss of society damages were not recoverable under general maritime law, the Eleventh Circuit in the present case simply read *Miles v. Apex Marine* too broadly, failing to recognize that it applied only in claims against the decedent's employer which were governed by the Jones Act. As correctly stated by the Northern District of Florida in the case of *In re Nobles*, 842 F. Supp. 1430 (N.D. Fla. 1993):

> "Any reliance on *Miles v. Apex Marine Corp.* . . . as to the motion to strike the claim for loss of society is misplaced. The limitations on loss of society damages

> expounded in *Miles* spring from statutes inapplicable in this instance: 'There is no recovery for loss of society in a Jones Act wrongful death action.' 111 S.Ct. at 325 . . . This case is not brought under the Jones Act." [id at 1434, n.9]

In reaching a conclusion which denied recovery of loss of society damages merely on the basis that the decedent 's parents were not dependent upon him, the Eleventh Circuit further erred in relying upon a line of cases which no longer has any sphere of application.

After the decision *Mobil Oil Corp. v. Higginbotham*, and before the decision in *Miles v. Apex Marine Corp.*,many courts had held that where a seaman's death occurred in state waters and was caused by unseaworthiness, his family could recover loss of society damages through the general maritime law cause of action for wrongful death established in *Moragne* and *Gaudet*. Since the statutory wrongful death remedy under the Jones Act specified the beneficiaries and the order of taking, those cases held with some degree of logic that damages for loss of society should only be awarded to the **statutory** beneficiaries entitled to recover pecuniary damages for the loss of support and services of the deceased. *Sistrunk v. Circle Bar Drilling Company*, 770 F. 2d 455 (5th Cir. 1985); *In re Patton-Tully Transportation Company*, 797 F. 2d 206 (5th Cir. 1986). Those cases concluded that "denial of recovery [by a persons other than the statutory beneficiaries] lends more uniformity to the admiralty jurisdiction then allowing recovery." [*Sistrunk* at 459]. Unfortunately, that perceived need for uniformity lead to the decision in *Miles v. Melrose*, 882 F. 2d 976 (5th Cir. 1989), where the Fifth Circuit held that the non- dependent mother of a minor seamen could not recover damages for loss of society even in the absence of dependent statutory beneficiaries.

Before *Miles* reached the Supreme Court, the Fifth Circuit decision was followed by a few cases, including *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990), where the same principle was applied in a pleasure boat accident out of a mis-perceived notion that maritime law required uniformity of wrongful death damages regardless of the status of the parties or the location of the accident. Of course, the decision of this Court in *Miles v. Apex Marine Corp.*, foreclosed recovery of non-pecuniary losses in any Jones Act case. This left loss of society damages recoverable only in cases not subject to a federal statutory death remedy. **Clearly, *Miles* left the cases underpinning the *Anderson v. Whittaker* decision with no field of operation since there is no longer a need for the non-pecuniary damage award in a pleasure boat case to be limited to the statutory beneficiaries of the damages allowed in a Jones Act case.**

The cases relied upon by the Eleventh Circuit have been proven wrong in their prediction that "We believe [the language in *Guadet*] indicates that the Supreme Court would deny recovery for loss of society damages by a non-dependent parent." [*Anderson* at 812] In *Yamaha Motor Corporation, U.S.A., v. Calhoun,* 516 U.S. 199 (1996), this Court took an extensive look at damages which may be recoverable in a pleasure boat death case.

In *Calhoun*, the decedent was the 12 year old daughter of the plaintiffs, who sought the recovery of loss of society damages. This Court concluded that the allowance of the recovery of non-pecuniary damages by non-dependent parents under applicable state wrongful death statutes was not contrary to any established principle of maritime law. Yamaha had argued that this result would allow different measures of damages to be recovered in different states, disrupting the uniformity of the admiralty law. However, this Court made it clear that

the uniformity required by maritime law was that which dealt with the conduct of the parties in the determination of liability and apportionment of fault, not the damage principles to be allied:

> "The uniformity concerns that prompted us to overrule the *Harrisburg*, however, were of a different order than those invoked by Yamaha. *Moragne* did not reexamine the soundness of *The Harrisburg* out of concern that state damage awards in maritime wrongful-death cases were excessive, or that variations in the remedies afforded by the States threatened to interfere with the harmonious operation of maritime law. Variations of this sort had long been deemed compatible with federal maritime interests. See *Western Fuel*, 257 U.S. at 242. The uniformity concern that drove our decision in *Moragne* related, instead, to the availability of unseaworthiness as a basis of liability." [516 U.S. at 211]

In *Calhoun,* this court emphasized that the *Moragne* remedy was a floor, not a ceiling, the Court stated that:

> "*Moragne*, in sum, centered on the extension of relief, not on the contraction of remedies. The decision recalls that 'it better becomes the humane and liberal character of proceedings in admiralty to give and to withhold the remedy, when not required to withhold it by established and inflexible rules.' " [id. at 214]

The District Court in the present case was unable to apply the Alabama Wrongful Death Act, Alabama Code §6-5-410, because of the decision of the Eleventh Circuit in *In re Amtrack "Sunset Limited"*

Train Crash, 121 F. 3d 1421 (11th Cir. 1997), holding that the damages allowed by that statute run contrary to established maritime law principles:

> "In sum, applying the Alabama Wrongful Death Act in this case so as to allow recovery for wrongful death based upon simple negligence only would deprive the litigants of substantial admiralty rights that must be applied . . . .
>
> Accordingly, as the federal maritime interests present in this action outweigh Alabama's interests in having its wrongful death statute apply in its entirety, we hold that the district court erred in applying the Alabama wrongful death statute to the wrongful death claims in this action insofar as such Alabama statute provides for the recovery of punitive damages for simple negligence only and prohibits apportionment of fault and damages among joint tortfeasors."
> [id at 1427]

In foreclosing the application of the Alabama Wrongful Death Act, however, the Eleventh Circuit clearly did not intend to leave the families of persons killed in pleasure boat accidents without any remedy. On this point, the Court specifically held:

> "In the case of *American Dredging Co. v. Lambert*, . . . this Court held that *Yamaha, supra*, extended the right of recovery in wrongful death cases to the non-pecuniary remedies afforded by the Florida Wrongful Death Act to actions for wrongful death to non-seamen occurring in state territorial waters. **The plaintiffs in the wrongful death actions have available to them**

> **the remedies provided in *Moragne v. States Marine Lines* . . . .**" [id at 1427; emphasis added]

The context in which that ruling was entered implied, without so stating, that the maritime common law wrongful death remedy allows for the award of damages for loss of society to the immediate family of the deceased, without regard to dependency. The majority of the persons killed in the Amtrak crash were older adults with grown children or retirees with no dependents. To interpret that case otherwise would have left all of those victims of that terrible tragedy with no claim beyond funeral expenses.

The decisions of the Eleventh Circuit in *American Dredging Co. v. Lambert*, 81 F. 3d 127 (11th Cir. 1996) and on appeal after remand, 153 F. 3d 1292 (11th Cir. 1998) correctly held that the award of loss of society damages to non-dependent immediate family was consistent with the damages recoverable under the maritime common law death action. In the initial decision, based upon the then-recent opinion of this Court in *Yamaha Motor Corp., U.S.A., v. Calhoun*, the Eleventh Circuit affirmed the district court ruling that the defendant was potentially liable for non-pecuniary damages:

> "The law of governing the availability of non-pecuniary damages in admiralty actions has a long and convoluted history. However, in *Yamaha Motor Corp., U.S.A. v. Calhoun*, . . . the Supreme Court has recently resolved the question presented in this appeal. . . . There, the Court held that, when the claimants are not seamen or longshore workers, federal maritime law does not displace state wrongful death and survival statutes permitting non-pecuniary damages and wrongful death actions arising out of accidents in

> territorial waters and that state remedies remain applicable in such cases. **Because, under *Calhoun*, no federal statute or common law precedent precludes the personal representatives from recovering non-pecuniary damages** under Florida law, we affirm the denial of partial summary judgment on the issue of the recoverability of non-pecuniary damages." [81 F. 3d at 130; emphasis added]

In a trial after the remand, the district court awarded substantial non-pecuniary damages to the parents of each of the decedents. American Dredging appealed again, arguing that the district court erred by awarding damages for emotional pain and suffering to the surviving parents, even though they were not dependent on their deceased children. The Eleventh Circuit rejected that argument, holding that the award of non-pecuniary damages to non-dependent parents of adult children does not conflict with establishe maritime common law principles. [143 F. 3d at 1297]

In concluding that *Moragne* and *Sea-Land Services, Inc. v. Gaudet* , 414 U. S. 573(1974), no longer had any applicability, we believe the Eleventh Circuit misconstrued the recent decision of this Court in *Norfolk Drydock & Shipbuilding Corp. v Garris*, 532 U.S. 811 (2001), which compels a conclusion in the present case that the maritime common law death remedy permits the recovery damages for loss of society by immediate family of the deceased, without regard to dependency.

In that case, Celestine Garris sought recovery for the death of her son which occurred while he was employed as a harbor worker by a sandblasting subcontractor at Norfolk Shipbuilding. Her damage claim was stated by the District Court in *Garris v. Norfolk Drydock*

& Shipbuilding Corp., 1998 U.S. Dist. Lexis 20374, 1999 A.M.C. 769 (E.D. Va. 1998):

> "Plaintiff seeks damages under general maritime law for funeral expenses, pain and suffering of the decedent, loss of society, and loss of services." [1998 U.S. Dist. Lexis, at *3]

She did not make any claim for loss of support, and surely was not dependent on her son. Ms. Garris had dismissed her state court suit under the Virginia wrongful death statute, Va. Code §§8.01-52, et. seq., which would allow such damages to a non-dependent parent. The District Court held that the maritime death remedy recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, did not include a cause of action for negligence, dismissing her maritime law claim with prejudice.

The Fourth Circuit, in *Garris v. Norfolk Drydock & Shipbuilding Corp.*, 210 F.3d 209, 220 (4th Cir. 2000), pointed out that Virginia law prohibited a tort action against a general contractor by the employee of a subcontractor under Va. Code §§65.2-302 by treating both as the "statutory employer" immune from suit under the workers' compensation laws. Therefore, the plaintiff could not assert the Virginia wrongful death statute and would have no cause of action unless the maritime law provided a negligence action for wrongful death. The Fourth Circuit agreed with the district court that the *Moragne* remedy did not include negligence. However, the Fourth Circuit held that there was no federal statutory impediment to creating a maritime negligence wrongful death remedy and no reason not to create such a remedy now. The Court held that the maritime common

law includes a wrongful death remedy based on negligence, providing a cause of action allowing Ms. Garris to seek damages for the death of her son.

This Court agreed with the Fourth Circuit as to both the limit of the *Moragne* remedy and the propriety of recognizing a general maritime law wrongful death negligence remedy:

> In sum, a negligent breach of a maritime duty of care being assumed by the posture of this case, no rational basis within the maritime law exists for denying respondent the recovery recognized by Moragne for the death of her son. [532 U.S. at 816-817]

The Court also made it clear that the "new" negligence wrongful death remedy was not impaired by or subject to the Jones Act, 46 U.S.C. §688, or the provisions of the Death on the High Seas Act, 46 U.S.C. §§761, et. seq.:

> "The Jones Act, 46 U.S.C. App. § 688(a), establishes a cause of action for negligence for injuries or death suffered in the course of employment, but only for seamen. . . . **Respondent's son, who was not a seaman, was not covered by the Jones Act, and we have held that the Jones Act bears no implication for actions brought by non-seamen**. . . . . **Moreover, even as to seamen, we have held that general maritime law may provide wrongful-death actions predicated on duties beyond those that the Jones Act imposes.** . . . The Jones Act does not preclude respondent's negligence action.
>
> DOHSA creates wrongful-death actions for negligence

> and unseaworthiness, see *Moragne,* supra, at 395, but only by the personal representatives of people killed "beyond a marine league from the shore of any State," 46 U.S.C. App. § 761. **Respondent's son was killed in state territorial waters, where DOHSA expressly provides that its provisions "shall . . . [not] apply,"** § 767. In Moragne, after discussing the anomalies that would result if DOHSA were interpreted to preclude federal maritime causes of action even where its terms do not apply, 398 U.S. at 395-396, we held that DOHSA "was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act," id. at 402. Or, "to put it another way, . . . no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." Id. at 400. DOHSA therefore does not pre-empt respondent's negligence action."
>
> [Id. at 817-818; emphasis added; citations omitted.]

Although the opinion does not specifically discuss damages, surely it did not escape the attention of the Fourth Circuit and this Court that Ms. Garris sought only the recovery of non-pecuniary losses. These Courts would not have gone to all that trouble to allow Ms. Garris to recover only funeral expenses.

The Eleventh failed to recognize that the clear statements of this Court in *Garris* and *Calhoun* would permit recovery for loss of society damages by a non-dependent parent in a negligence claim for wrongful death under general maritime law.

As correctly argued by the Petitioner, the decision below is directly in conflict with the Ninth Circuit decision in *Sutton v. Earles,*

26 F.3d 903 (9th Cir. 1994) We further submit that the decision below conflicts withe the award of loss of society damages to a non-dependent parent, in the opinion written in 137 years ago by Justice Chase in *The SEA GULL*, 21 F. Cas. 909 (C.C. Md. 1865). In that case, a young man had been killed in a vessel collision. The father of the decedent brought suit for the loss of his son. Justice Chase awarded damages, holding:

> "In *Ford v. Monroe*, 20 Wend. 210, a father recovered damages for the death of his son, killed by the negligence of the defendant's servants; and in *James v. Christy,* 18 Mo. 162, an action was maintained against the owner of a boat, brought by a father to recover damages for the death of his son, occasioned by a defect in the machinery. These latter authorities were approved of by Judge Sprague, in the case of *Cutting v. Seabury*. He observes that 'the weight of authority in common-law courts seems to be against the action, but natural equity and the general principles of law are in favor of it.' He adds: '**It is not controverted that if a father be willfully and wrongfully deprived of the services, society, and control of his minor son, he may maintain an action against the wrong-doer if the son survive. Why, then, if the same wrong be done and aggravated by the death of the child, should his right of action be lost?**' It is difficult to answer this question, **and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.**"
> [Id. at 910; emphasis added.]

This case has been cited with approval and quoted in substance repeatedly by this Court, including the decisions in: *Yamaha Motor Corp., U.S.A., v. Calhoun*, 516 U.S. 199, 213 (1996); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990); *Offshore Logistics v. Tallentire*, 477 U.S. 207, 234 (1986); *American Export Lines v. Alvez*, 446 U.S. 274, 282 (1980); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 590 (1978); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 583 (1974); and *Moragne v. States Marine Lines*, 398 U.S. 375, 387 (1970).

There is absolutely no reason for the Eleventh Circuit to have ruled otherwise in this case. We urge the Court to grant certiorari in order to give rather than to withhold the remedy since there are no established and inflexible rules restricting the recovery of loss of society damages in a state-waters death case of this type.

Finally, we urge the Court to grant certiorari review of this decision because a substantial percentage of pleasure boat cases will involve persons with no dependents. Since these case do not arise out of employment, a significant number of these cases will involve children, young adults without children, and mature adults whose children are grown and no longer dependent on them. Alabama is not unique in this regard, but unfortunately has perhaps the last wrongful death statute in the nation which allows the recovery of punitive damages for simple negligence.

The issue presented in this case also has application beyond the boundaries of our state, to cases involving facts such as those present in *Garris,* where the mother had no remedy under state law, and to cases involving the death of a seaman in state waters caused only by the fault of a third party not subject to the Jones Act, *In re Denet Towing Service, Inc.*, 1999 U.S. Dist. Lexis 8058 (E.D. La. 1999).

The result of the decision below is that the parents of the decedent would be limited to funeral expense of only $7,500.00 as damages for the death of their son. Surely the maritime law of the United States should not allow this result.

CONCLUSION

We respectfully urge this Court to grant certiorari to define the maritime common law negligence damage remedy for wrongful death in this case where no state or federal statute applies. This Court should also certiorari to confirm that the result of the decision in *Garris v. Norlfolk Shibuilding, supra,* allows immediate family members to recover damages for loss of society for the death of child or a parent, without regard to dependency.

Respectfully submitted,

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